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In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD GEORGE MASKENY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

TONY DARWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM G. OTIS
MARSHALL TAMOR GOLDING
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a)[1] is reported at 609 F.2d 183.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1433.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on January 4, 1980. A petition for rehearing was denied on February 14, 1980 (Pet. App. 25a-26a). The petition for a writ of certiorari in No. 79-1433 was filed on March 14, 1980. The petition in No. 79-1532 was filed on March 31, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury-selection plan for the Southern District of Georgia deprived petitioners of their right to a jury drawn from a fair cross-section of the community, in violation of the Jury Selection and Service Act of 1968 or the Constitution.

2. Whether the district court misled petitioners with respect to its intended action on their proposed jury instructions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Georgia, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to commit that offense, in violation of 21 U.S.C. 846. Petitioners Maskeny, Perkins, Sidney Pernell, Julian Pernell, Toombs, and Darwin were also convicted of conspiring to import and importing marijuana, in violation of 21 U.S.C. 952(a), 960, and 963. They were sentenced to various terms of imprisonment, special parole, and probation,[2] and, in addition, Julian Pernell was fined $5,000. The court of appeals affirmed (Pet. App. 1a-22a).

Petitioners do not contest the sufficiency of the evidence to support their convictions. The evidence at trial showed that several petitioners engaged in a conspiracy to import marijuana from Colombia (Pet. App. 1a-2a, 4a-8a). Petitioners Maskeny, Darwin, and Perkins flew a twin-engine airplane loaded with more than 3600 pounds of marijuana from Colombia to Sylvania, Georgia. The remaining petitioners were waiting with trucks in the woods adjacent to the airport, and, when the plane arrived, they transferred the cargo to the trucks and drove away with it. Customs agents and state police were informed of the planned importation in advance and had the airport under surveillance. All of the conspirators were arrested either at the airport or when their trucks were stopped after they left the airport.

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[2] Petitioner Maskeny was sentenced to 30 months' imprisonment and a four-year special parole term; petitioners Harvey and Perkins were sentenced to six months' imprisonment and a four-year special parole term; petitioner Blackburn received a suspended prison sentence and was placed on supervised probation for three years; petitioner Crocker was sentenced to six months' imprisonment and a three-year special parole term; petitioner Murchison was sentenced to six months' imprisonment, a four-year special parole term, and three years' supervised probation; petitioners Toombs and Sidney Pernell were sentenced to imprisonment for a year and a day and four years' supervised probation; petitioner Julian Pernell was sentenced to six months' imprisonment, a two-year special parole term, and three years' supervised probation; and petitioner Darwin was sentenced to 36 months' imprisonment and a four-year special parole term (Pet. App. 4a n.1).

ARGUMENT

1. Before trial, petitioners asserted that the indicting grand jury and the petit jury were not chosen from a fair cross-section of the community. The records on which their challenge was based [3] showed that the jury wheels were filled, in accordance with the district court's jury-selection plan, by a random selection from the district's voter registration lists. Black persons accounted for 29% of the population of the district and 20% of the grand-jury wheel.[4] The district court rejected petitioners' challenge to the jury-selection method, and the court of appeals affirmed. Relying on *Swain* v. *Alabama*, 380 U.S. 202 (1965), the court of appeals held that the "absolute disparity" of less than 10% was insufficient to "make out a case of a constitutionally impermissible disproportion" (Pet. App. 13a). The court also found that petitioners did not show "either that the

[3] Rather than offering evidence of their own, petitioners moved to incorporate the arguments and exhibits in another jury challenge case, *United States* v. *Lyons*, No. CR 277-12 (S.D. Ga.), vacated and remanded on other grounds, No. 78-5340 (5th Cir. Dec. 14, 1979). Subsequently, they discovered that the grand jury in *Lyons* was selected from a jury wheel filled four years before the wheel from which their grand jury was selected. Petitioners then moved to incorporate demographic data introduced in two other cases involving challenges to the more recent wheel. The court granted their motion solely for informational purposes in the event the court of appeals desired such information (Pet. 5-6 & n.1; Pet. App. 29a-31a).

[4] Blacks represented 31% of the population of the division in which the trial was held and 24% of the petit-jury wheel. Petitioners here limit their discussion to the grand-jury challenge, assertedly "for simplicity" (79-1433 Pet. 10 n.6).

use of voter registration lists has a substantial impact on the composition of the average grand jury or that their use results in the systematic exclusion of a cognizable group from jury source" (*id.* at 19a). Accordingly, the court of appeals concluded that the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1869, did not require the use of a supplemental source for potential jurors.

The gist of petitioners' contention here is that the court of appeals erred by applying an "absolute disparity" test rather than a "statistical significance" test or, preferably, a "comparative disparity" test.[5] This case, however, does not present any occasion for the Court to choose among the different kinds of tests, even assuming that it is desirable to select one as the primary benchmark. The grand-jury and petit-jury wheels satisfied constitutional and statutory requirements regardless of whether an "absolute disparity" or a "comparative disparity" test is applied, and the "statistical significance" test has no relevance to this case.

The Jury Selection and Service Act of 1968 requires that federal juries be "selected at random from a fair

[5] "Absolute disparity" is computed by subtracting the percentage attributable to an underrepresented group in the jury wheel from the percentage that that group represents in the population at large. "Comparative disparity" is computed by dividing the absolute disparity by the proportion of the population in the underrepresented group. This test is said to better reflect the amount by which the probability of serving is reduced for persons in the underrepresented group. The test of "statistical significance" is the probability that a given disparity would have occurred by chance (see 79-1433 Pet. 11-12).

cross section of the community" (28 U.S.C. 1861) and provides that no citizen shall be excluded from jury service "on account of race, color, religion, sex, national origin, or economic status" (28 U.S.C. 1862). In order to make a prima facie showing of a violation of the statutory fair cross-section requirement, petitioners must demonstrate that a "cognizable" group within the community was substantially underrepresented in the grand-jury wheel for the Southern District of Georgia or in the petit-jury wheel for the Savannah Division of that district, where their trial occurred. See *United States* v. *Brady*, 579 F.2d 1121, 1132-1133 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). In order to make a prima facie showing of discrimination in the jury selection process, in violation of the Sixth Amendment, petitioners must also establish that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979).

Petitioners have failed to show a prima facie violation of either the statute or the Constitution, because their statistics do not indicate that black persons are substantially underrepresented on jury rolls in the Southern District of Georgia. In the first place, the disparities alleged by petitioners are probably overstated because, if black persons account for 29% of the total population in the Southern District of Georgia, they almost certainly represent a smaller percentage of the jury-age population in that

district.[6] But, even accepting petitioners' statistics at face value, their challenge to the jury selection process is foreclosed by *Swain* v. *Alabama*, *supra*, in which this Court rejected a similar challenge where black persons accounted for 26% of those eligible for the jury duty but only 10% to 15% of those actually serving on grand-jury or petit-jury panels. The Court stated (380 U.S. at 208-209; citations omitted):

> [A] defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor [*sic*] on the venire or jury roll from which petit jurors are drawn. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. * * * We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.

As in *Swain*, there is no evidence in this case that different selection standards were applied based on the race of prospective jurors. On the contrary, the jury selection plan in the Southern District of Georgia specifies that jury wheels are to be filled by random

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[6] The 1970 Census reveals that in that year the total population of Georgia was 25.9% black, but the jury-age population (18 years old and older) was only 22.9% black. *1970 Census of the Population: Characteristics of the Population*, vol. I, pt. 12: Georgia, Table 19, at 12-57, and Table 20, at 12-58 and 12-62 (March 1973).

selection from lists of registered voters, a method explicitly authorized by Congress in the Jury Selection and Service Act of 1968.[7] Federal courts that have considered the matter have uniformly sustained the use of such lists as the basis for compiling lists of prospective jurors, even when defendants have objected that this method of jury selection results in the underrepresentation of identifiable groups whose members are underrepresented among registered voters. This Court has consistently denied review in such cases. See, *e.g.*, *United States* v. *Coats*, 611 F.2d 37 (4th Cir. 1979), cert. denied, No. 79-1230 (Apr. 21, 1980); *United States* v. *Butler*, 611 F.2d 1066 (5th Cir. 1980), petition for cert. pending on other grounds, No. 79-1839; *United States* v. *Lopez*, 588 F.2d 450 (5th Cir.), cert. denied, 442 U.S. 947 (1979); *United States* v. *Arlt*, 567 F.2d 1295, 1297 (5th Cir.), cert. denied, 436 U.S. 911 (1978); *United States* v. *Grismore*, 546 F.2d 844, 848 (10th Cir. 1976); *United States* v. *Freeman*, 514 F.2d 171 (8th Cir. 1975); *United States* v. *Guzman*, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973). See also *United States* v. *Goff*, 509 F.2d 825 (5th Cir.), cert.

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[7] The "statistical significance" test discussed by petitioners (79-1433 Pet. 14-16) is inapposite in these circumstances. That test is applied where jury lists are compiled by a method other than random selection. It is used to determine whether the system employed can produce a representative jury list and to enable reviewing courts to draw inferences concerning the likelihood of deliberate discrimination in the system's operation. See, *e.g.*, *Castaneda* v. *Partida*, 430 U.S. 482 (1977) (Texas "key man" system).

denied, 423 U.S. 857 (1975); *Simmons* v. *United States*, 406 F.2d 456, 462-463 (5th Cir.), cert. denied, 395 U.S. 982 (1969) ("[n]o significant improvement in our nation's federal judicial machinery has ever met such unanimity of opinion as to its importance and propriety as has adoption by the Congress of the system of jury selection at random from voter registration lists").

Particularly where, as in this case, the statistical disparities are even lower than those considered in *Swain*,[8] there is no statutory requirement that voter registration lists be supplemented from other sources. As the Tenth Circuit stated in *United States* v. *Evans*, 542 F.2d 805, 812 (1976), cert. denied, 429 U.S. 1101 (1977), "the circuits are in complete agreement that not only is the use of actual voter lists proper, but that neither the Act nor the Constitution require[s] that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population." Because petitioners have not established a prima facie constitutional or statutory violation under any con-

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[8] The "absolute disparity" in *Swain* was, at minimum, 11%. The "comparative disparity" in *Swain* was, at minimum, 42%. The comparable figures here are 9% and 31%. By contrast, in *Duren* v. *Missouri*, *supra*, where the Court found unconstitutional discrimination, women represented 54% of the community population but only 15% of those on jury venires. 439 U.S. at 365-366. In *Taylor* v. *Louisiana*, 419 U.S. 522, 524 (1975), the corresponding figures were 53% and 10%. The "comparative disparity" in those cases was, respectively, 72% and 81%—far in excess of the 31% "comparative disparity" here.

ceivably relevant standard, this case does not present a suitable occasion for this Court to consider which of several available statistical tools is most useful in evaluating challenges to jury selection methods.[9]

2. Petitioners also argue (79-1433 Pet. 18-23) that the district court violated Fed. R. Crim P. 30 by misleading them concerning the instructions the court intended to give to the jury. This contention is groundless.

At the close of the government's case, petitioners moved for a judgment of acquittal on the ground that the government failed to prove that the marijuana involved in this case was the particular species regulated under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Tr. 678-685).[10] The court denied petitioners' motion, holding that the Act proscribed "all types [of] Cannabis" (Tr. 685-686). Petitioners then inquired if the court's ruling meant that they could not "still argue it" before the jury (Tr. 687). The court replied (*ibid.*):

> You mean as to whether this is marijuana? Surely you can argue that. In fact, I'm going to charge that unless the Government proves beyond a reasonable doubt that that is marijuana as defined and meant in the statute that the defendants will be acquitted.

[9] Petitioners urge that the court of appeals' use of the "absolute disparity" test could lead to incongruous results if the underrepresented group were sufficiently small (79-1433 Pet. 14). As the court of appeals correctly noted (Pet. App. 15a), however, the question of the proper test to apply when a small minority is underrepresented is properly left to a case presenting that fact situation.

[10] The government presented an expert in forensic chemistry who testified that he had tested samples of the substance involved in this case and had concluded that the substance was marijuana (Tr. 601-606).

Petitioners began the defense case by presenting an expert on forensic chemistry who testified that Cannabis is a genus of which there are two and possibly three species and that the tests performed by the government's expert witness were insufficient to determine whether the marijuana involved in this case was sativa L. or some other species (Tr. 739-745). Counsel later submitted a proposed instruction that repeated the definition of "marijuana" set forth in 21 U.S.C. 802(15), *i.e.*, that the "term 'marihuana' means all parts of the plant Cannabis sativa L." The proposed instruction further stated that petitioners should be acquitted if the government did not prove that the substance involved was "marihuana" within this definition. A substantial part of petitioners' argument to the jury was based on the theory that the government had failed to prove that the substance involved was sativa L. and not some other species of marijuana.

The court gave petitioners' proposed instruction that the government had the burden of proving beyond a reasonable doubt that the substance involved was marijuana within the meaning of federal law, *i.e.*, "the plant botanically known as Cannabis sativa L." (Tr. 959). The court added, however, that "under that law there is only one species of * * * marijuana. Marijuana as far as the law is concerned, is not divided into species" (Tr. 960).

Fed. R. Crim. P. 30 requires the district court to inform counsel, before closing arguments to the jury, of the court's proposed action on requested instructions. Petitioners maintain (79-1433 Pet. 7) that the district court, by promising to instruct the jury that petitioners could be convicted only if the government proved that the substance was marijuana within the statutory definition, "continued to treat the [multi-species] question as if it were a factual matter to be considered by the jury," and thereby prejudicially misled defense counsel. Taken in context, however, the court's remarks did not suggest that the multi-species question was a matter for the jury to resolve. The court had just finished ruling that the statutory definition included "all types [of] Cannabis." The question that the court promised to leave to the jury was not whether the substance was a particular species of Cannabis, but whether it was Cannabis at all.[11]

In light of the court's expressed reasons for denying petitioners' motion for judgment of acquittal as well as its subsequent statement that the statutory definition "will go before the jury with my instruction" (Tr. 748), petitioners could not reasonably have expected the court's final instructions to leave the multi-species question to the jury. If defense

[11] Part of the testimony of petitioners' expert was that the tests performed by the government's expert were inconclusive for distinguishing Cannabis from other substances (Tr. 728-732, 734-738). Petitioners also attacked the government expert's expertise and the accuracy of his tests in cross-examination (Tr. 607-637, 641-649, 655-668).

counsel had any lingering doubts on the subject they could have been eliminated through a specific inquiry to the court. Having made no such inquiry, petitioners may not now argue that they were surprised by the court's instruction.[12]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM G. OTIS
MARSHALL TAMOR GOLDING
Attorneys

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[12] If there was any genuine surprise to defense counsel in the court's instruction, it was invited by counsels' own insistence on pressing an incorrect theory of defense. As the court of appeals observed (Pet. App. 8a-9a), all courts of appeals that have addressed the question have agreed that all species of Cannabis are covered by the Comprehensive Drug Abuse Prevention and Control Act of 1970. The district court here adequately alerted counsel of its agreement with this settled view. The court properly continued to permit evidence concerning the chemical identity of the substance seized because of the legitimate possible defense that the substance was not marijuana. Counsel's asserted construction of the court's action as an indulgence of the improper "species theory," even after the court disavowed that theory, was a misinterpretation for which counsel, and not the court, was primarily responsible.

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